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IN THE

Supreme Court of the United States

OCTOBER TERM—1951

No......

THOMAS RYAN, LOUIS AIGES, LEON ALTHEIM, HYMAN BASSIN, DAVID BERGER, JOSEPH W. BIANCA, EDWARD F. BRENNAN, SALVATORE CIRIGLIANO, CARMELO COSCIA, ABE FRIEDMAN, EMANUEL GOLDBERG, LOUIS S. GOLDKRANZ, ABRAHAM I. GORDON, ANTHONY GUERRIERO, JOSEPH HAUGH, WALTER HELLER, LOUIS HOCHBERG, JOHN T. HOLCOMB, JOHN JONES, PETER A. KELLY, DANIEL KENNY, WILLIAM KLEINMAN, NEIL KNOWLES, JOHN R. MCGUINESS, LOUIS H. MEYERS, FRANK PARELLA, ROCCO PARELLA, ALFRED PETRASSI, BENJAMIN RICOTTA, HARVEY ROSE, AARON SACKS, HENRY SADOWITZ, MICHAEL SCUDERO, JACK SENDER, IRWIN L. SIEGEL, JOHN W. SMITH, NICHOLAS STASI, ARTHUR STERNBERG, DAVID STUPNICK, MANNY HIRSCHBEIN, ANTHONY F. CHICCOLI, BENJAMIN GORDON, DONALD MALLOZZI, JACK MILLER and CARL J. ERICSSON, Petitioners,

against

JOSEPH SIMONS, as President of NEWSPAPER AND MAIL DELIVERERS' UNION OF NEW YORK AND VICINITY, an unincorporated association consisting of more than seven members, and NEWS SYNDICATE CO., INC., Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK *

To the Honorable Fred M. Vinson, Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

Petitioners respectfully pray that a writ of certiorari be issued to review the final judgment entered on the

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* Unless otherwise indicated, all page references refer to the Appendix annexed to this brief, and all folio references refer to the Record in the Court of Appeals.

amended remittitur of the Court of Appeals of the State of New York in the Office of the Clerk of the County of Queens on August 8, 1951 (pp. 53-59), which affirmed the judgment of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, entered in the office of the Clerk of the County of Queens on November 2, 1950, which had reversed a judgment of the Supreme Court of the State of New York, Queens County, entered in the office of the Clerk of the County of Queens on May 11, 1950 (p. 49), in favor of the petitioners and against the respondents, and dismissed the petitioners' complaint on the law.

Jurisdiction

The jurisdiction of this Court is invoked under Sections 1257 and 2101 of Title 28 of the United States Code Annotated (Judiciary and Judicial Procedure).

Questions Presented

The questions presented for review by this Court are:

(1) The Court of Appeals of the State of New York had held (*Clark* v. *Curtis,* 297 N. Y. 1014), prior to its determination in the instant case, that where a labor union, representing the majority of the employees in a plant, had entered into a collective bargaining agreement with the employer, the employees who were non-union members could bring suit in a state court against the union where it had, as a fiduciary agent, betrayed the interest of its principals, the non-union employees. In this case the Court of Appeals held that such employees no longer had that common law right.

Questions presented on this appeal are, therefore: Did the Taft-Hartley Act destroy the previously existing com-

mon law right of non-union employees as principals to sue in the State Court to restrain the betrayal of their interests by their faithless agent, the union?

(2) If the Court of Appeals was correct in its interpretation that the Taft-Hartley Act did deprive the petitioners of such common law right against their faithless agent, was such destruction of the common law rights of the petitioners unconstitutional?

(3) The respondent labor union representing the majority of the employees in the delivery department of the respondent employer's plant limited its membership to the sons of its own members. It then entered into a collective bargaining agreement under the provisions of the Taft-Hartley Act providing for a union shop, requiring all employees to be or become members of the Union within thirty days after the effective date of the agreement. At the end of the said thirty day period, the Union continued to refuse to admit to membership any of the petitioners (who were employed by the respondent-employer in its delivery department but were not members of the Union).

The Trial Court granted judgment directing the Union to admit the petitioners into membership or else to cease acting as a collective bargaining agent for all the employees. The Court of Appeals reversed that judgment.

The next questions presented on this appeal are, therefore:

May a union, under the Taft-Hartley Act, continue to act as a collective bargaining agent while limiting membership to its own sons and refusing to admit non-union employees into membership?

(4) If the Taft-Hartley Act does give the power to labor unions to limit its membership and thus keep the power of representation in the grasp of only some of the employees, is the Taft-Hartley Act unconstitutional in that respect?

Statute Involved

This appeal involves the interpretation and constitutionality of the Labor Management Relations Act, 1947 (29 U. S. C. A., Sec. 141, *et seq.*), known as the Taft-Hartley Act.

Statement of Facts

Respondent, News Syndicate Co., Inc. (hereinafter referred to as the "News") is the publisher of the New York Daily News and the New York Sunday News. Respondent Newspaper and Mail Deliverers' Union of New York and Vicinity (hereinafter referred to as the "Union") is a union whose membership includes the majority of the employees employed in the delivery department of all the large newspapers published in the City of New York.

The petitioners are all employed by the News in its delivery department. None of the petitioners are members of the Union, although all of them have applied for membership and been rejected.

The Union is what is known as a "closed union". Its books are and have been for many years closed to all new members except: (a) one legitimate male issue of a deceased member who had been in good standing for ten years; or (b) where a deceased member left no legitimate male issue, then, in that event, one legitimate male issue of a living member in good standing for more than twenty years could apply for the unclaimed card (Union's Constitution, Secs. 8 and 9, Pltffs'. Ex. 10, fols. 1715-1726, 1062-1064).

The foregoing restrictions have been strictly enforced. As a result, none of the petitioners have been able to join the Union though all of them have applied for membership and have at all times been ready and anxious to join (fols. 1205-1215).

On October 25, 1948, the News (through its agent, the Publishers Association of New York City) and the Union entered into a collective bargaining agreement (hereinafter referred to as the "Agreement") covering the employees in its delivery department (fol. 554).

In entering into the Agreement, the Union admittedly acted as the exclusive bargaining agent for all of the employees, including the petitioner, working in the delivery department of the News (fols. 171-172).

The Agreement of October 25, 1948 provided for what is known as a "union shop". Prior to the making of that agreement, the News plant was operated as a "closed shop".

The relevant portion of paragraph 2-L of the collective bargaining Agreement reads as follows (fols. 1642-1643):

> "The employer agrees to employ only members of the Union thirty days following the effective date of this agreement, it being understood that any new employees * * * employed after the effective date of this agreement be required to become members of the Union thirty days following the beginning of employment." (The omitted portion relates only to so-called "half-day boys" and it was stipulated that none of the plaintiffs are in that category—fols. 1601-1602.)

Said Section 2-L also provided (fol. 1642):

> "The Union offers to furnish at all times and at regular time rates as many men as may be required by a Publisher, such men to be competent and able to perform the particular operation for which they are required."

The Proceedings in the State Courts

The petitioners commenced an action in the Supreme Court of the State of New York, County of Queens against the Union and the News to enjoin the enforcement of the Agreement on the grounds that it represented a violation of the fiduciary duty owed by the Union, as exclusive bar-

gaining agent, to the petitioners, its principals, and to compel the Union either to admit the petitioners into membership or to waive the Union shop provisions of the Agreement.

The case came on for trial before Mr. Justice Francis G. Hooley, sitting without a jury, at a Special Term, Part III of the Supreme Court of the State of New York, Queens County.

The Opinion of the Trial Justice Whose Findings of Fact Were Affirmed

Mr. Justice Hooley granted judgment in favor of the petitioners with an opinion fully considering the law and the facts. Mr. Justice Hooley's opinion is set out in full in the appendix of this petition (pp. 37-48).

All of the findings of fact set forth in Mr. Justice Hooley's opinion have been affirmed by the Appellate Courts and, therefore, for purposes of this appeal, are deemed established.

Judge Hooley found that, as a matter of law, the Union, as bargaining agent, owed the duty of representing non-union employees fairly.

The Trial Justice found that the Union did not fairly represent the petitioners in negotiating the Agreement and that it breached its obligation as bargaining agent for petitioners by providing that the employer would employ only members of the Union thirty days following the effective date of the contract, and by offering to furnish at all times as many men as might be required by the News, although the Union then, and at all times thereafter to the present time, has arbitrarily excluded the petitioners from membership in the Union.

The Court found that the complaint herein is not based upon any statute, but is based upon the common law principle that an agent is held to the highest good faith in his dealings with his principal, and if the agent acts adversely

to the principal in any part of the transaction he is guilty of fraud. Judge Hooley pointed out that a Union shop is not illegal, but that the illegality here arose from the fact that the agent Union entered into an Agreement providing for a Union shop while, at the same time, it arbitrarily excluded petitioners from membership.

Judge Hooley pointed out that the Union had a monopoly of the distribution of the great newspapers of the City of New York and had wholly forgotten the rights of the workers whom it was under an obligation to protect, and had arrogated to itself the right to interfere with the livelihood of the forty-five petitioners and their families in the interest of perpetuating a hereditary class of newspaper deliverers.

The Trial Justice specifically found that the actions of the Union herein which imposed limitations on the right of other men to follow the calling of newspaper delivery were repugnant to the common law, the labor statutes, and the Constitution of the United States.

The Trial Court also found that the attempt by the Union to maintain a Union shop in which many non-Union men are employed while at the same time insisting on a closed Union violates the Constitution of the United States in that it denies to the petitioners the equal protection of the law. He said the Union could not deny to the petitioners freedom of the right to contract in favor of other persons whose only claim to a preference is derived from the accident of birth.

The Trial Court also found that the contentions of the respondents that petitioners' remedy is within the exclusive jurisdiction of the National Labor Relations Board, could not be sustained.

The Court then discussed fully the relief sought by the petitioners seeking to compel the Union to admit the petitioners to membership. The Court first pointed out that the law in this state, for a long time, has been that a union cannot be compelled to admit strangers to membership,

but the Court also pointed out that none of the cases ever decided by the courts had the slightest resemblance to the case at bar.

The petitioners here, the Court said, were not strangers. They were principals for whom the Union acted as an agent.

Yet their agent executed an agreement limiting employment to members of the Union except where Union men were not available, and despite that limitation, their own agent (the Union) arbitrarily excluded the petitioners from membership. And the hiring practices followed after the Agreement gave preference and privileges to the Union men not enjoyed by the petitioners.

The Court stated the principle of law to be the following (pp. 47-48):

> "Where a union is designated as a bargaining agent on behalf of all of the employees and accepts the principle of the Union shop and incorporates such principle into a contract which provides that all non-union men must join the union within 30 days, then such provisions of the agreement relating to the union shop are illegal, invalid and void in a case such as this, where the union refuses to admit such non-union men to membership without just cause and discriminates against such employees because of such non-membership in the Union."

And the Court pointed out that it was no excuse to say that the action of the Union in denying membership to petitioners does not violate the Taft-Hartley Act. For the Court said—and this is very important—this action is not brought under the Taft-Hartley Act (p. 48).

And, upon all the circumstances of the case, the Court found that the Union, owing as it did, the high obligation of an agent to his principal, must take the petitioners into the Union or else refrain from conducting their activities and relations with the petitioners upon the basis of the principle of a union shop.

The Court therefore granted an injunction to the petitioners directing the Union to admit the petitioners to full membership, or, in the alternative, restraining the respondents from conducting their activities and relations with the petitioners upon the basis of the principle of a union shop.

The Reversal by the Appellate Division

The Appellate Division, in a *per curiam* opinion, unanimously reversed on the law the judgment in favor of the petitioners entered after trial (pp. 52-53).

Although the Appellate Division, in its opinion, held that the complaint was based on a common law cause of action for breach of obligation by an agent, nevertheless, the Appellate Division ruled that the controversy involves unfair labor practices within the provisions of the Labor Management Relations Act, 1947, and, therefore, exclusive jurisdiction thereof is vested in the National Labor Relations Board.

In reversing and dismissing the complaint on the law, the Appellate Division specifically affirmed the facts found by the Trial Justice below (p. 52).

The opinion of the Appellate Division is included in the Appendix (pp. 52-53).

Proceedings in the Court of Appeals

The petitioners herein appealed to the Court of Appeals in the State of New York.

The Court of Appeals affirmed, without opinion, the judgment of the Appellate Division reversing the judgment of the Supreme Court, Queens County.

Thereafter, the petitioners moved in the Court of Appeals to have that Court amend its remittitur so as to state

the grounds of its decision "in order to remove uncertainty and make it clear to the Supreme Court of the United States, upon application for a writ of certiorari, whether or not a federal question was necessarily decided" (Petitioners' Motion to Amend Remittitur, p. 17).

The Court of Appeals granted the motion to amend the remittitur, and added to the remittitur a statement clearly showing that its decision was based on its interpretation that the cause of action asserted herein was barred by the Labor Management Relations Act, 1947, so that a federal question is necessarily involved on this petition. The amended remittitur is annexed as part of the Appendix to this petition (pp. 53-54).

The Manner in Which the Federal Questions Sought To Be Reviewed Were Raised, and the Way in Which They Were Passed Upon by the Courts Below

The questions of interpretation of the Taft-Hartley Act and the constitutional questions herein were consistently raised in this action from its very inception.

In their amended complaint filed in the Supreme Court, Queens County, the petitioners contended that the actions of the respondents herein deprived them of their rights guaranteed under the Constitution of the United Sta'es (pp. 31-32). In its answer filed in that Court, the Union contended that under the Labor Management Relations Act, 1947, this action could not be maintained (p. 34). In their opening statements at the Trial Court, counsel for both defendants pointed out that the remedy of the petitioners was by application to the National Labor Relations Board and not to the State Courts (fols. 101-151).

In his opinion granting judgment to the petitioners, the Trial Justice ruled that the Taft-Hartley Act did not exclude the State Court from jurisdiction in this case. The Trial Justice also ruled:

> "The attempt of the defendant Union to impose limitations on the right of other men to follow the calling of newspaper deliverers is repugnant to the common law, the labor statutes, state and federal, and the Constitution of the United States" (p. 41).

The Trial Justice also found that the attempt by the Union to maintain a union shop in which non-union men are employed, while at the same time insisting on a closed union, is a paradox violating the Constitution of the United States, in that, it denies to the petitioners the equal protection of the laws (pp. 41-42).

On the appeal to the Appellate Division, respondent Union contended, as its Point I, that sole jurisdiction of this controversy lay with the National Labor Relations Board under the Taft-Hartley Act. The News, as its first Point in its brief on the appeal to the Appellate Division also contended that exclusive jurisdiction of this controversy under the Taft-Hartley Act was given to the National Labor Relations Board.

In their brief to the Appellate Division, petitioners contended, in their Point III, that denial of the relief requested herein would violate their rights under the Fifth Amendment to the Constitution of the United States. The petitioners, in their brief, also denied that th National Labor Relations Board was granted exclusive jurisdiction of this controversy under the Taft-Hartley Act.

The Appellate Division, in reversing the judgment of the Trial Court, ruled that exclusive jurisdiction of this controversy was granted to the National Labor Relations Board by the Labor Management Relations Act, 1947 (pp. 52-53).

In their brief submitted to the Court of Appeals, petitioners argued the Labor Management Relations Act, 1947 did not deprive the State Courts of their jurisdiction of this controversy, and continued further that if the Appellate Division correctly interpreted the Labor Management Relations Act, 1947, then that Act violated the Fifth Amend-

ment to the Constitution of the United States. The Court of Appeals made clear by their order granting the motion to amend the remittitur that their decision was based upon their interpretation of the Labor Management Relations Act, 1947 (p. 54).

Reasons for Granting the Writ

The questions involved in this petition concern basic interpretations of one of the most important statutes ever enacted by the Congress of the United States—the Labor Management Relations Act, 1947.

The Court of Appeals of the State of New York has interpreted the Act in such a way that it becomes a powerful weapon of oppression against the petitioners and against all persons similarly situated who are forced to be represented in negotiating for their livelihood by a union which systematically excludes them from membership while at the same time it continuously betrays their interests.

Questions presented on this appeal have never been passed on by this court. If the interpretation given to the Labor Management Relations Act, 1947, in this situation is proper, then this Court should pass upon the constitutionality of that Act as so interpreted. If the interpretation given to the Act by the Court of Appeals is improper, this Court should correct the interpretation for the guidance of the petitioners and for those similarly situated.

(1)

The first question involved in this proceeding is whether the Labor Management Relations Act, 1947, has deprived petioners of common law rights which they previously had, and, if so, whether the Act is unconsitutional in that respect.

The Court of Appeals has interpreted the Taft-Hartley Act so as to deprive petitioners of the common law right which they previously had to restrain a faithless agent from violating its obligations.

This action was brought on the common law principle of agency. The Union was by law an agent of all persons employed in the delivery department of the News, including the petitioners. As such agent it was required to represent the petitioners fairly; instead, the agent entered into an Agreement providing for a union shop while excluding the petitioners from membership solely because they were not sons of union members; and by so doing, the Union violated its common law obligation of fairly representing its principals. Under such circumstances, petitioners were entitled to the relief demanded in their complaint.

Prior to this action, the New York Court of Appeals had sustained a complaint, which was identical *mutatis mutandis* with the instant complaint. In that case, *Clark* v. *Curtis,* 297 N. Y. 1014, the plaintiffs there had sued the identical Union and their employer on the identical agreement which is here involved, except the *Clark* agreement provided for a closed shop while in the instant case the agreement provided for a union shop which, after the thirty day period, became for all intents and purposes a closed shop. In the instant case the complaint was dismissed solely because the Taft-Hartley Act had been enacted after the service of the complaint in *Clark* v. *Curtis, supra.*

The Trial Justice had sustained the complaint in this case on the authority of *Clark* v. *Curtis* (fols. 1912-1913). However, the Appellate Division in reversing pointed out that the case of *Clark* v. *Curtis, supra,* was instituted prior to the passage of the Labor Management Relations Act, 1947, and that the question of exclusive jurisdiction of the National Labor Relations Board under that Act was not raised nor could it have been raised in that case.

And, of course, the Court of Appeals, in its amended remittitur, definitely explained that its decision was based on its interpretation that the Labor Management Relations Act, 1947, deprived the State Courts of jurisdiction in this case.

It is clear that under the New York State law the petitioners would have been entitled to the relief sought had not the Court of Appeals found that the Labor Management Relations Act, 1947, had divested the state's court of jurisdiction. (See also *Wilson* v. *Hacker,* 101 N. Y. S. 2d 461, official citation not available).

The fallacy in the reasoning of the Court of Appeals lies in the fact that the Labor Management Relations Act, 1947, fails to vest in the National Labor Relations Board any authority to grant the full relief sought by the petitioners.

In other words, although the Court of Appeals has held that the Act has divested the state courts of the jurisdiction which it normally would exercise (cf. *Clark* v. *Curtis, supra*), the Act itself provides no remedy.

This court has held that where the administrative remedy is not adequate to provide the relief sought, there is no obligation on the part of petitioners to exhaust such administrative remedy before applying to the state courts for relief.

Thus, in *Steele* v. *Louisville & Nashville Railroad Co.,* 323 U. S. 192, this court rejected the argument that the plaintiffs involved there must pursue their administrative remedy under the Railway Labor Act (25 U. S. C. A. Sections 151 et seq.). Before seeking an injunction against a majority union which, while barring them from membership, betrayed their interests. In so ruling, the court stated (at p. 206):

> "There is no administrative means by which the Negro firemen can secure separate representation for the purposes of collective bargaining. For the Mediation Board 'has definitely ruled that a craft or class of employees may not be divided into two or more on the basis of race or color for the purpose of choosing representatives'."

It is the petitioners' contention that the Court of Appeals erred in its construction of the Labor Management Relations Act, 1947, since that Act afforded no remedy to the petitioners for the relief which it sought in the state courts. Where the administrative remedy is insufficient to afford adequate relief, the state courts are not divested of jurisdiction.

We submit that this Court should rule finally on whether the Labor Management Relations Act, 1947, has deprived the state courts of the jurisdiction which they previously had to restrain the breach of its obligations to its principals by the agent Union.

The Labor Management Relations Act, 1947, gave these petitioners no rights which they had not theretofore possessed. The Act did, however, take away from them a very important right—the right to bargain in their own behalf with their employer.

There is, of course, no question but that the requirement that the employer bargain collectively only with the representative of the majority is an abridgement of the minority's fundamental rights. It is for that reason that the Union, chosen by the majority, is made equally the representative of the minority.

However, the broad public purpose served by compelling the employer to bargain only with the representative of the majority does not mean that the bargaining agent has no obligations to the minority. In fact, it has been repeatedly stated by courts at every level that the Union owes the identical obligation to the minority which it owes to the majority.

If, then, the minority is to be deprived of its right to enforce against its agent (the Union) the obligation to deal fairly in their behalf, they have been deprived of their fundamental rights without any corresponding remedy to enforce the statute. Such a provision is clearly in derogation of the petitioners' common law and constitutional rights.

The statute should not be construed in such a way as to be in derogation of the rights of these plaintiffs without an express statement in the statute to that effect. Nowhere in the statute is there any provision that petitioners are to be deprived of their common law rights of enforcement against faithless agents.

The statute, moreover, fails to provide an adequate remedy by which the petitioners (non-union members) can protect themselves against a closed union which, by the principle of the union shop, perpetuates itself in existence, acts as a hostile representative to the non-union members whose interests it is supposed to protect, and is able, in hundreds of ways, unseen and unseeable, to do damage to these non-union employees who can never have an opportunity to be heard in its councils, nor to elect its officers and representatives. The petitioners are entitled to their common law right to protect themselves against those acts by their faithless agent.

If, in fact, this Court should find that the Labor Management Relations Act, 1947, deprives the petitioners of that common law right of action which they formerly had, then, it is respectfully submitted, the Act is, in that respect, unconstitutional.

The Taft-Hartley Act purports to protect against only one limited phase of the evil with which these petitioners are confronted; loss of their jobs because they are not union members. And even in that regard, the purported protection of the Taft-Hartley Act is very dubious.

For example, on February 28, 1951, the United States Court of Appeals for the Third Circuit (*National Labor Relations Board* v. *Reliable Newspaper Delivery, Inc.*, 187 Fed. (2nd) 547), in an action against the very Union named as respondent here, held that the only discrimination which the Act prohibited was such discrimination as tended to encourage or discourage membership in a labor union.

However, the Court held, in the *Reliable* case, that no act of the employer could encourage membership in the re-

spondent union which strictly limited its membership to the sons of its own members. The non-union employees in the *Reliable* case were all anxious to join the respondent Union. None of them being fortunate enough to be eligible sons of members, could do so, however. And so the Court said, in finding for the employer there, that no action of the employer could encourage them to join this Union which they were already so anxious to join and could not do.

That is precisely the position of these petitioners, who also would like to join the respondent Union but cannot do so.

It is interesting to note that the Court, in the *Reliable* case, pointed out that the complainants there had failed to take any action in the State courts but instead had proceeded before the National Labor Relations Board in the first instance (187 Fed. (2nd) 551). And the Court also mentioned that where a non-union employee was threatened with discharge and replacement by a member of the same Union involved in this matter, the New Jersey Court of Chancery had issued an injunction restraining the Union from interfering with the non-member's employment (187 Fed. (2nd) 551, citing *Wilson* v. *Newspaper &c. Union,* 123 N. J. Eq. 347).

The ruling that the Labor Management Relations Act, 1947, has destroyed all of the petitioners' rights against their faithless agent, the Union, leaving them with only the limited remedy available to them before the National Labor Relations Board, constitutes a serious deprivation of their rights, and, if not erroneous, would make the Act unconstitutional.

There are many acts which can be committed by both an employer and a union which might constitute unfair labor practices and also constitute common law wrongs. Thus, a violent assault by union members on persons who are not members of the Union to prevent the latter from obtaining employment would be an unfair labor practice.

But it would also unquestionably be a common law wrong. Yet, under the interpretation laid down by the Court of Appeals, the Labor Management Relations Act, 1947, would bar the assaulted victims from seeking their common law remedy in the state courts. If, in fact, Congress intended the Labor Management Relations Act, 1947, to have that effect, then it is unconstitutional.

(2)

There is another question which should be reviewed by this Court which is of equal or more far-reaching importance. That is the question of whether a labor union which enters into a collective bargaining agreement as an agent of all the employees may bar certain of the employees from becoming members solely on the ground that they are not sons of the present Union members.

The Taft-Hartley Act does not forbid a union from limiting its members arbitrarily. Thus, in many cases, the National Labor Relations Board has declined to withdraw or refuse certification on the ground that the Union would not admit all the employees to membership. (*Norfolk Southern Bus Lines,* 83 N. L. R. B. 15; *Veneer Products,* 81 N. L. R. B. 492; *Texas and Pacific Motor Transport Co.,* 77 N. L. R. B. 15.)

The respondents in this case argued in all courts that the Taft-Hartley Act did not require the Union to admit the petitioners into membership, and that principle was accepted by the State courts.

The very fact that the Taft-Hartley Act does not permit the National Labor Relations Board to compel admission of fellow employees into the union which represents them is itself a most important reason for leaving jurisdiction in the State courts, since the plaintiffs cannot get adequate relief before the NLRB (*Steele* v. *Louisville & Nashville R. R. Co.,* 323 U. S. 192; *Tunstall* v. *Brotherhood of Locomotive Firemen,* 323 U. S. 210).

Exhaustive research has not disclosed any case in which this Court has ruled on the right of a union, acting as collective bargaining agent for all the employees, to exclude from membership arbitrarily certain employees whom it represents.

The right to obtain an order from the National Labor Relations Board against provable discriminations is a sorry protection to the employee who is willing and even anxious to join the Union but who is not permitted to do so. The only right which would really protect the worker is the right to join the Union which represents him and controls the bargaining process.

That right has never been passed upon by this Court.

In order to protect the principle of collective bargaining and to promote democratic practices in industrial relations, the Congress provided, first, in the National Labor Relations Act and then in the Labor Management Relations Act, 1947, that the group representing the majority of the employees of a particular unit, should be the exclusive bargaining agent for all of the employees in that unit.

The Union, designated by the majority, has now become, by law, the exclusive representative of all the employees in a particular unit, for the purpose of collective bargaining. There is an affirmative duty on the part of the employer to deal only with the Union. The employer is forbidden to deal with any other group of employees or any individual employee. The Union decides, by means of a collective bargaining contract, how much the excluded worker will be paid, when he will work, when he may have a vacation, when he may be laid off or discharged, the seniority he will enjoy, what he will receive as a pension when he retires, and what protection he has against accidents and illness.

Thus, from the cradle to the grave, the excluded worker's economic life and, as a result, to a great extent, his social and family life are ruled by the Union.

In all of those matters, discrimination against non-members is often carried out so deviously and subtly that no legal proof can be made.

Certainly, membership in the Union which represents him and controls his economic life is the least protection which an employee should be given against this agent to whom the law has given the sole right of bargaining which has been taken away from the individual employee.

Unjustified exclusion of any employee from the Union is a repudiation of the democratic, the representative function of the Union. By reason of the Labor Management Relations Act, 1947, it is only through the Union that the worker can exercise his bargaining power and his right to be heard. If the worker can have no share in deciding what his wages will be, when a strike is to be called, or how seniority will operate, then the Taft-Hartley Act has deprived him of his right to contract and given it to some agent to exercise in his behalf with no right on his part to share in the control of his agent's actions.

The evil is accentuated in this case because of the Union shop provision. The respondent Union, limiting its membership to the sons of its own members and having a monopoly of the newspaper delivery industry, can thus perpetuate its hereditary control.

This Court should review the determination of the Court of Appeals that the State Court no longer has jurisdiction to order a union either to admit non-union employees to membership or else to cease acting as a collective bargaining agent. (*James* v. *Marinship Corp.*, 25 Cal. (2nd) 721; *Clark* v. *Curtis,* 297 N. Y. 1014.)

If the Labor Management Relations Act, 1947 was correctly interpreted by the Court of Appeals, then the Act itself is unconstitutional in that regard.

It is petitioners' contention that they cannot constitutionally be compelled to be represented forever by a Union (by the very nature of the Union and its closed membership) in which they can never be members, for whose negotiators

they can never vote, in whose policies they have no voice, and upon the ratification of whose agreements they can never pass.

This Court has never expressed itself directly on that point. However, this Court did say in *Steele* v. *Louisville & Nashville Railroad Co.*, 323 U. S. 192, 198, 202, that:

> "Congress has seen fit to clothe the bargaining representative with powers comparable to those possessed by a legislative body * * *."

and again:

> "The representative is clothed with power not unlike that of a legislature which is subject to constitutional limitations on its powers to deny, restrict, destroy or discriminate against the rights of those for whom it legislates * * *."

The so-called "white primary" cases are analogous. In *Smith* v. *Alwright*, 321 U. S. 649, this Court held that a resolution of the State Convention of the Democratic Party, a voluntary association, which excluded negroes from participation in primaries by excluding them from membership violated the Fifteenth Amendment.

In *Rice* v. *Elmore*, 165 F. (2d) 387 (4th Circ., 1947), cert. den., 33 U. S. 875, the Court considered the argument of the leaders of the Democratic Party in South Carolina, that a political party is a mere private aggregation of individuals who were free to bar from membership any applicants for any reason or no reason.

Judge Parker, speaking for the Court, rejected this argument in the following language:

> "The fundamental error in defendant's position consists in the premise that a political party is a mere private aggregation of individuals, like a country club, and that the primary is a mere piece of party machinery. The party may, indeed, have been a mere private aggregation of individuals in the early days of the Republic, but with the passage of the years, political parties have become in effect state institutions, govern-

> mental agencies through which sovereign power is exercised by the people. Party primaries are of more recent growth. Originating in the closing years of the last century as a means of making parties more responsive to the popular will in the nomination of candidates for office, they had been adopted by 1917 in all except four of the states of the Union as a vital and integral part of the state election machinery" (165 F. 2d at 389).

Surely, the right of an individual to have some part in the negotiations which vitally affect his whole existence is as necessary under our economic system and as fundamental under our Constitution as the right of the individual to participate in the affairs of a political party.

By a Congressional Act—the Labor Management Relations Act, 1947—the majority employees were able to take from the petitioners the right to bargain with their own employer, and give that exclusive bargaining power to the Union. The Union, thus claiming its bargaining power under the Congressional Act, must exercise that power subject to the same constitutional limitations imposed upon the legislature. Certainly, the Congress could not constitutionally legislate that a political party which, by majority vote, has won an election, could thereafter bar non-members from joining the party.

If the Labor Management Relations Act, 1947, as interpreted by the New York State Court of Appeals, permits this Union to arbitrarily exclude from membership the employees whom it represents, then the Act itself is unconstitutional.

CONCLUSION

The issues involved in this proceeding are of far reaching importance to the petitioner; and to the public welfare. Those issues have never been passed upon directly by this Court.

This Court should review the question of whether the Labor Management Relations Act, 1947 has deprived petitioners of common law rights which they formerly had. If the Act does have that effect, this Court should rule on its constitutionality.

This Court should also determine the question of whether a union, under the Taft-Hartley Act, may exercise the power of collective bargaining and, at the same time arbitrarily exclude employees from membership. If a union may do so under the Taft-Hartley Act, the constitutionality of the Act itself should be reviewed by this Court.

For the foregoing reasons, it is respectfully prayed that this petition for a writ of certiorari be granted.

Respectfully submitted,

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and
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